

MARTIN R. MAYLAND

IBLA 94-886

Decided November 5, 1997

Appeal from a decision issued by the Washakie (Wyoming) Area Manager, Bureau of Land Management, finding Martin L. Mayland to be in trespass for constructing, operating, and maintaining an irrigation ditch on public land without authorization. WYW-131010.

Set aside and referred for hearing.

1. Act of July 26, 1866--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

Repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1976), by section 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793, did not affect rights-of-way previously acquired under the Act of July 26, 1866.

2. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rules of Practice: Appeals: Hearings--Trespass: Act of July 26, 1866

When an appellant charged by BLM under 43 C.F.R. § 2801.3 with unauthorized use of the public lands presents evidence on appeal that he may have utilized a right-of-way vested under the Act of July 26, 1866, BLM presents no credible evidence to rebut appellant's assertion, and the record is not sufficient to accurately identify the location and scope of the unauthorized use, the case will be referred to a hearing on that question.

3. Administrative Procedure: Hearings--Rules of Practice:
 Appeals: Hearings--Trespass: Generally

When BLM determines trespass liability, pursuant to 43 C.F.R. § 2801.3, for use of the public lands without a required right-of-way but presents no clear evidence of the location, length, or nature of the trespass, the issue of liability and BLM's computation of that liability will be referred to a hearing.

APPEARANCES: Martin R. Mayland, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Martin R. Mayland has appealed an August 26, 1994, Decision issued by the Washakie (Wyoming) Area Manager, Bureau of Land Management (BLM). In his Decision, the Area Manager found Mayland in trespass as a result of Mayland's unauthorized construction, use, and maintenance of an irrigation ditch "along White Creek in the White Creek Allotment #1536," in the W $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 28 and the E $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 29, T. 53 N., R. 90 W., Sixth Principal Meridian, Big Horn County, Wyoming. 1/

In his Statement of Reasons (SOR) on appeal, Mayland, who owns and farms lands near White Creek, argues that he was not in trespass because he did not make a new ditch. He states that "[m]y father and Uncle bought this ranch over forty years ago. This ditch was there as early as I can remember. It had been cleaned twice prior to my ownership in 1988 at which time I recleaned it." (SOR at 2.) Mayland asserts that the right-of-way for the ditch "was grandfathered in" as a part of a water right and right-of-way he held on nearby land. (SOR at 1, 2.) A handwritten statement by Andrew I. Davis, enclosed with Mayland's SOR states:

To whom it may concern:

I farmed the White Creek ranch from 1946 until 1958. I also rented same from Maylands' for 5 years. [I was raised] on Kershner property from birth [in] 1924. The north ditch coming out of White Creek has been used for as long as my memory serves.

My Grand Father A. A. Kershner owned the White Creek place and he settled there in 1897 and the ditch was there shortly after that. That ditch was there before there was a B. L. M.

Andrew I. Davis

(Statement of Andrew I. Davis at 1.)

1/ See 43 U.S.C. §§ 1733, 1761-1771 (1994), and 43 C.F.R. § 2801.3 (1994).

Three maps are found in the case file. The first (Map 1) is an 8-1/2 by 11 inch topographical map. Hand-drawn lines on Map 1 appear to identify parts of grazing allotment No. 1536 in secs. 19, 25, 28, 29, 30, and 32. ^{2/}

The second map (Map 2) is hand-drawn, undated, and unsigned. It identifies White Creek on BLM land as a dry streambed paralleled by a canal identified on the west as the Boylan Ditch and on the east as the "new canal." The dry creek bed and the irrigation ditch converge at two points.

At approximately the midpoint, a dam across the stream channel, is identified as the "original 1905 point of diversion." The second convergence at the eastern end of White Creek is identified as the new canal and the structure is identified as the upper headgate. A "lateral ditch" crosses the Boylan ditch and the dry streambed west of the 1905 point of diversion and travels northwest across BLM land to private land.

^{3/} A third map (Map 3) is a land status plat entitled "Partially Surveyed Township 53 North Range 90 West of the 6th Principal Meridian, Wyoming," which indicates the status of public domain land and mineral titles. Map 3 shows no reservations or structures on the W^{1/4}NW^{1/4} sec. 28 and the E^{1/4}NE^{1/4} sec. 29, T. 53 N, R. 90 W.

None of the maps provided by BLM indicates when the irrigation ditches identified as the lateral ditch and the new canal in Map 2 were constructed or whether those structures existed in whole or in part before the ditch was cleaned by Mayland. The case file contains an undated, unsigned, handwritten note that states: "Steve Christy could not see any water in the ditch above the old diversion in the 8-7-80 aerial photos. The ditch is present in the aerial photos dating back to 1975." However, it is not clear whether the ditch referred to in the note is the lateral ditch, the new canal, the Boylan Ditch, or all of them, and there are no aerial photos in the case file.

[1] Mayland's SOR refers to a "grandfathered" right-of-way for the irrigation ditch he cleaned, and he states his belief that the right-of-way ran with his land. (SOR at 1-2.) Prior to the passage of the Federal Land Policy and Management Act (FLPMA) on October 21, 1976, it was possible to obtain a right-of-way across public lands for "ditches and canals," under the Act of July 26, 1866, 43 U.S.C. § 661 (1970), which provided:

Whenever, by priority of possession, rights of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized, and acknowledged by the local customs, laws, and decisions of courts, and the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed * * *.

^{2/} The northern and eastern boundaries of allotment No. 1536 are not clearly delineated on Map 1.

^{3/} Neither Map 1 nor Map 2 has a scale which could be used to indicate the length or width of the entities described. The hand-drawn Map 2 does not identify the land by section number.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

(Emphasis added.)

Section 706(a) of FLPMA, 90 Stat. 2793, amended 43 U.S.C. § 661 (1970), by deleting those clauses underlined above relating to rights-of-way. Historically, the reference to "ditches and canals" in the Act of July 26, 1866, was interpreted broadly to encompass rights-of-way for reservoirs, dams, flumes, pipes, and tunnels. See Roger G. Gervais, Patsy V. Gervais, 128 IBLA 43, 49-50 (1993), quoting Peck v. Howard, 167 P.2d 753, 761 (Cal. App. 1946). In R.W. Offerle, 77 IBLA 80, 84-85 (1983), this Board described the effect of FLPMA on water rights vested pursuant to section 661 as follows:

[P]rior to FLPMA one availed himself of section 661 by merely constructing a ditch or canal, no application to any official of the United States beforehand being necessary for a right-of-way over public land. Clausen v. Salt River Valley Water Users' Ass., 59 Ariz. 71, 123 P. 2d 172 (1942). See Bear Lake Irrigation Co. v. Garland, 164 U.S. 1 (1896). Section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), provides in pertinent part: "Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Clearly, since no consent or permission is required under section 661 to initiate a right-of-way, one who has complied with section 661 on or before October 21, 1976, the effective date of FLPMA, has a valid "right-of-way heretofore permitted" within the meaning of section 1769(a).

(Footnote omitted.) 4/

It appears from the record that Mayland may hold a water right, pursuant to Wyoming State permit No. 6799, to divert water from White Creek for irrigation and stock-watering purposes. An unsigned undated note in the record identifies permit 6799 as "one water filing on White Creek. Boylan Ditch, July 10, 1905. Irrig. 3.24 CFS 227 acres. Sec. 29 T. 53 N R. 90 W. quad map."

4/ The Decision cited in the omitted footnote is Bumble Bee Seafoods, Inc., 65 IBLA 391, 398 (1982). The footnote points out that by Order dated Dec. 13, 1982, the Board vacated the Decision in Bumble Bee Seafoods. However, by Order dated Mar. 11, 1983, the Board reinstated that Decision insofar as it held that Bumble Bee had a vested right to a right-of-way under 43 U.S.C. § 661 (1970). See R.W. Offerle, supra, at 85.

The record contains a copy of a letter, dated September 2, 1993, from the Water Rights Supervisor, Wyoming State Engineer's Office, to Mayland, regarding "Boylan Ditch, Permit No. 6799, diverting from White Creek, trib. Shell Creek, trib. Big Horn River." The letter reads, in pertinent part, as follows:

It has recently been brought to our attention that the location of the referenced ditch headgate may have been moved from the record location which is 1160 feet South and 320 feet West of the NE corner of Section 29, T53N, R90W and is located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 29.

According to the information we have been provided, the headgate is now located in Section 28 on land administered by the Bureau of Land Management.

(Letter of Sept. 2, 1993, at 1.)

The Wyoming State Water Rights Supervisor advises Mayland that if the point of diversion has been changed, "the records of the State Board of Control and State Engineer must be updated to reflect the on-the-ground situation * * * by submitting a petition to the Board of Control [to] change the point of diversion." Mayland is further advised that while there is no fee charged for submitting a petition to change the point of diversion, the petition "must be accompanied by a certified map showing the record point of diversion and a newly surveyed corner tie showing the amended or present point of diversion [and] * * * [p]roof of ownership of the 227 acres under [the water] appropriation [permit]." The letter cautions Mayland that the "issuance of a permit for a water right does not constitute the granting of a right of way," and that the permittee is responsible for obtaining all rights-of-way. (Letter of Sept. 2, 1993, at 1.) There is nothing in the record to indicate that Mayland submitted a petition to the State of Wyoming Water Rights Supervisor to change the point of diversion.

On February 9, 1994, Mayland filed an application with the Washakie Area Office, BLM, to amend an existing authorization to permit a right-of-way for a head gate and ditch, 15 feet wide, 1/4 mile long, with a 10-foot capacity. 5/ Mayland requested that the right-of-way permit year-round use for an indefinite term of years. (Application for Transportation and Utility Systems and Facilities on Federal Lands, Feb. 9, 1994, at 1.)

5/ Mayland's measurements on the application are used by BLM to calculate his trespass liability. See document in record entitled "R/W Acreage by State, County and Rental Zone, State Of Wyoming," Serial Number WYW-131010, prepared July 28, 1994, by V. Trickey. The record shows no evidence of an independent measurement made by BLM.

The record indicates that Mayland filed the application for a right-of-way with the understanding that BLM would investigate whether the application was necessary or whether the ditch "would qualify for recognition and notation under the Act of July 26, 1866, covering existing ditches and canals." (Letter from Washakie Area Manager to Martin R. Mayland, dated June 14, 1994.) The Washakie Area Manager's investigation resulted in the following conclusion:

Based on our examination, including personal interviews and field examination of the subject ditch and the public land involved, it appears that the irrigation ditch and headgate cannot be recognized and noted under the Act of July 26, 1866. Additionally, it appears that the ditch and related facilities were constructed on public land in violation of the Federal Land Policy and Management Act of October 21, 1976. The suspected unauthorized use must be satisfactorily resolved before any right-of-way or permit may be approved. Accordingly, a trespass notice is enclosed, to which you have an opportunity to respond to the allegations of unauthorized use.

(Letter of June 14, 1994, at 1).

Mayland did not comply with BLM's request of June 14, 1994, that he resolve the finding of unauthorized use of the public lands. Subsequently, BLM issued the Trespass Decision of August 26, 1994.

We find the record supplied by BLM falls far short of providing a clear and convincing rationale for its conclusion that the ditch Mayland cleaned is not a right-of-way vested under the provisions of the Act of July 26, 1866. The evidence provided in the record by BLM to support this conclusion includes a handwritten note, dated "5-25-94," by BLM employee Craig B. Mowry, which reads as follows: "Mayland bought Lander[']s [private] fields at White Creek on May 31, 1990. (Deed in M. Mayland's File) Sept[.] 10, 1991 Lander Trans. BLM AUMs over to Mayland. (Trans. in M. Mayland File)." No further reference is made to the deed of conveyance and any provisions it may or may not have contained providing for rights-of-way across public land for the conveyance of water. Additionally, the record contains no evidence of an attempt to discern the existence of any vested rights-of-way that may have passed by deed or patent to Mayland as owner of the White Creek ranch. The record is silent regarding any attempt by BLM to discuss these matters with Mayland.

Two additional handwritten notes reference the "personal interviews" alluded to in the June 14, 1994, BLM conclusion that the Act of July 26, 1866, does not apply to Mayland's ditch and that he therefore is in trespass under the provisions of FLPMA. The first handwritten note, dated "8-26-93," and signed by Craig B. Mowry, memorializes a telephone conversation with Chuck Lander and reads: "Called Chuck to check on White Creek canal. He said Martin Mayland extended the canal when he bought the farm

land from Chuck about 3 years ago." Another handwritten note inscribed in the record by Mowry, dated "5-24-94," further identifies Lander as follows:

I talked to Chuck [Lander] at the Range Reform open house in Greybull.

Chuck wants to stay out of it as much as possible because his daughter is married to Maylands stepson.

Chuck said that there is a new ditch north of the Creek above the old head gate where he used to get water. He didn't know if Mayland had OK'ed this with the BLM or not. All he knows is that after he sold the fields to Mayland, 4-5 years ago, Mayland put in a new ditch on the North side of this Creek. Mayland now gets more water than Lander ever did because so much water gets lost between the new Point of Diversion & the old one.

[2, 3] Mowry's interviews with Lander raise questions about the identity and location of the canal or ditch referenced in the conversations. ^{6/} Additionally it is not clear whether Mayland used and did not change an existing irrigation waterway, extended a waterway already in existence, or constructed an entirely new waterway on Federal land. The evidence presented in Mayland's SOR (Statement of Andrew I. Davis) suggests that Mayland used an existing waterway, one that he thought he was permitted to use as a vested right-of-way under the Act of July 26, 1866, and which Davis asserts had been in existence since "shortly after [1897]." ^{7/}

In reviewing the record in this case, we find the evidence presented by BLM insufficient to support a Decision of trespass against Martin Mayland, and we conclude that the record and the evidence Mayland presents on appeal raise material questions of fact whether a trespass occurred and whether BLM is able to hold Mayland financially liable for it. While it is possible that Mayland has committed a trespass, the record presented by BLM neither adequately explains nor supports the nature or degree of the alleged unauthorized use of the public lands. Therefore, we refer the case for a hearing to resolve the matter.

Accordingly, we must set aside the August 26, 1994, Decision of the Area Manager holding Mayland liable as a trespasser for the unauthorized construction, use, and maintenance of an irrigation ditch on the public

^{6/} The new canal as identified in Map 2 is north of the White Creek streambed, running parallel with the streambed in an east-west direction. It appears to extend the Boylan Ditch. The lateral ditch identified in Map 2 runs in a northwesterly direction from the Boylan Ditch and dry streambed onto private land.

^{7/} An unsigned and undated note in the record states: "Currently there is only one adjudicated water filing on White Creek (used to be 2 points of Diversion)."

land. The case is referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an administrative law judge for the purpose of holding a hearing and issuing a decision on the question of the status of the irrigation ditch on public land, and the extent of Mayland's responsibility for the trespass, if any. ^{8/} Following the hearing, a decision will be made which will be final for the Department in the absence of a proper appeal to the Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside, and the case is referred to the Hearings Division for further action consistent herewith.

R.W. Mullen
Administrative Judge

I concur:

James P. Terry
Administrative Judge

^{8/} Since this referral for hearing results from our inability to adjudicate this case on the record supplied by BLM, we urge that Mayland not be assessed costs for the hearing.